Supreme Court of the United States

OCTOBER TERM, 1952

No. 404

WARNER D. ORVIS, HOMER W. ORVIS, FLOYD Y. KEELER, F. HOWARD SMITH, HAROLD A. ROUSSELOT, HENRY H. BALFOUR, J. ANTONIO ZALDUONDO, WILLIAM G. WIGTON, CLIFFORD J. DOERLE, and HERBERT R. JOHNSON, doing business under the firm name and style of ORVIS BROTHERS & CO., and JOHN J. McCLOSKEY, JR., as CITY SHERIFF of the CITY OF NEW YORK,

Petitioners,

against

JAMES P. McGRANERY, Attorney General of the United States, as Successor to the Alien Property Custodian,

Respondent.

BRIEF AS *AMICUS CURIAE* SUPPORTING PETITIONERS

HENRY I. FILLMAN,
Amicus Curiae.

CITATIONS

Cases:

IN THE

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BRIEF AS *AMICUS CURIAE* SUPPORTING PETITIONERS

The undersigned, as counsel for John F. McCarthy, the petitioner in the two cases of *McCarthy* v. *McGrath,* which were decided by this Court together with the companion cases of *Zittman* v. *McGrath,* 341 U. S. 446, 471, respectfully files, with consent of the Solicitor General and petitioners pursuant to Rule 27, paragraph 9(a) of the Rules of this Court, this brief as *amicus curiae,* for the reason that the case at bar, which involves the interpretation of the opinions in those cases, may affect McCarthy's rights under his attachment liens on the property *res* vested and taken over by the Alien Property Custodian.

Question Presented

Whether the lien obtained in 1943 by the levy of an attachment warrant in a New York Supreme Court action by United States citizens against a Japanese national on the latter's blocked property, subsequently *res* vested and taken over by the Custodian,[1] is an "interest, right, or title" in the vested property which may be recovered by the attachment creditors by a suit under Sec. 9(a) of the Trading With the Enemy Act.

Statement

In the first *Zittman* and *McCarthy* cases, 341 U. S. 446, this Court held that New York warrants of attachment levied on blocked accounts of German nationals, whose "right, title, and interest" therein the Custodian subsequently sought to vest, created a valid lien thereon under New York law and that if the Custodian takes over the blocked accounts under a *res* vesting, all

> "questions as to recognition by the Custodian of the state law lien, or priority of payment, are reserved for decision if and when presented in accordance with the Act" (p. 464).

In the second *Zittman* and *McCarthy* cases, 341 U. S. 471, this Court held that the Custodian was entitled to take possession of blocked accounts of German nationals which had been attached under New York law, but that the transfer of possession to the Custodian

> "does not purport to work any automatic deprivation of rights of any class of creditors, but takes over the estate for administration",

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[1] "Custodian" refers throughout to either the Alien Property Custodian or his successor, the Attorney General.

and that (p. 474) the

> "consequences, if any, that flow from the substitution of the Custodian in place of the bank as holder of the funds, upon rights derived from *valid state court judgments secured by attachment, are not ripe for determination*",

because they

> "may never come into controversy"

and, therefore, all

> "questions as to the petitioners' claims, judgments or priorities are reserved for decision in the proceedings prescribed by statute." (Italics supplied.)

The distinction between the *Zittman* and *McCarthy* cases and the case at bar is that there the attachments were levied before the issuance of General Ruling No. 12 (7 F. R. 2991) under Executive Order No. 8389, whereas here the attachment was levied on the blocked accounts of the Japanese national after the General Ruling was issued. However, as indicated by this Court in the first *Zittman* and *McCarthy* cases (341 U. S. at p. 458),

> "consistent administrative practice treated"

the levy of attachments upon blocked property

> "as permissible and valid"

and, therefore, the validity of the lien obtained by the levy of the attachment here involved is not affected by the General Ruling.

ARGUMENT

I

Since the levy of the attachment created a valid lien on the property subsequently taken over by the Custodian, Orvis Brothers & Co., as provided by Sec 34(i) of the Trading With the Enemy Act, have an "interest, right, or title" which may be recovered by suit under Sec. 9(a) of the Act.

In view of the decisions of this Court in the *Zittman* and *McCarthy* cases, *supra*, the attachment levy involved here is valid under New York law and, therefore, it created a lien on the attached property subsequently taken over by the Custodian.

In *Matter of People* (First Russian Ins. Co.), 253 N. Y. 365, 368, Chief Justice Cardozo said:

> "The claimant, the attaching creditor, is not asserting a claim to participate in the fund as a beneficiary of a trust, a member of the class or group for whom administration was assumed. The claim which it asserts is not in subordination to the trust, but in priority and even, in a sense, in hostility thereto. The lien of its attachment has put it in the same position as if it were the holder of a mortgage or of an equitable lien, the product of agreement. A receiver or other officer taking such a fund into his custody, must take it as he finds it, with all its imperfections on its head. One of those imperfections for this receivership was a lien created as security, not for principal alone, but for principal and interest. The fund is not free until the lien has been discharged" (citing cases).

In *West Virginia Pulp & Paper Co.* v. *People's Home Journal, Inc.*, 233 App. Div. (N. Y.) 376, the Court said, at page 379, that

> "a valid lien once acquired by an attaching creditor cannot be set aside and the creditor deprived of its rights in the property upon which the lien attaches."

As stated by Mr. Justice Bradley in *The Lottawanna*, 21 Wall. 558, 579, and by Mr. Justice Gray in *The J. E. Rumbell*, 148 U. S. 1, 11,

> "a lien is a right of property, and not a mere matter of procedure."

In *Haebler* v. *Myers*, 132 N. Y. 363, 368, the Court said that

> "A lien is property in the broad sense of that word, * * *."

Manifestly, the attachment lienor here is not a simple "debt" claimant.

The Trading With the Enemy Act makes a distinction between obligations in simple debt (Sec. 34) and those constituting a right in property, such as a lien (Sec. 9(a)). Sec. 34 gives the Custodian authority to pay "debt claims" asserted by creditors of the former owners of the seized property. It provides, however, in subdivision (i)

> "that no person asserting any interest, right, or title in any property * * * acquired by the Alien Property Custodian, shall be barred from proceeding pursuant to this Act for the return thereof, by reason of any proceeding which he may have brought pursuant to this section; nor shall any security interest asserted by the creditor in any such property or interest be deemed to have been waived solely by reason of such proceeding."

Referring to subdivision (i) in his analysis of the bill which became Sec. 34, submitted in the form of a letter dated February 1, 1946, to the Chairman of the House Committee of the Judiciary (*Hearings before Subcommittee No. 1 of the Committee of the Judiciary, House of Representatives, 79th Cong., 2d Sess. on H. R. 5089*, p. 17), the then Custodian, James E. Markham, said:

> "Subsection (i), at line 18 on page 12, is generally procedural in nature. * * * *Protection of a secured creditor or a creditor claiming a lien is afforded by the proviso on page* 13. Such a claimant may proceed as a general creditor, without waiving his security. Or *he may elect not to participate in a debt-claim distribution but to file a claim or suit as a title claimant for return of his claimed interest in the property* or for just compensation, in which event his recovery would be reduced, as in the case of any other such plaintiff, to the extent of any debt-claim payment made to him (or to any other person, if *his claim as a title claimant* was not filed in time to hold up debt-claim payments)." (Italics supplied.)

In enacting the bill the Congress adopted the Custodian's position that a creditor claiming a lien may recover his security interest in the seized property by suit, for both the Senate and House Reports on the bill (Senate Rep. No. 1839, 79th Cong., 2d Sess., p. 9; House Rep. No. 2398, 79th Cong., 2d Sess., p. 15) state:

> "Protection of a secured creditor or a creditor claiming a lien is afforded by the proviso in subsection (34) (i). Such a claimant may proceed as a general creditor, without thereby waiving his security. In addition or alternatively, *he may file a claim or suit as a title claimant for return of his security interest in the property* or for just compensation in

respect of that interest, in which event his recovery would be reduced, as in the case of any other such plaintiff, to the extent of any debt-claim payment made to him (or to any other claimant, if his claim as a title claimant was not filed in time to hold up debt-claim payments). *It is believed that this arrangement is preferable to provision of a separate special procedure for secured creditors.*" (Italics supplied.)

Sec. 9(a) of the Act permits a person who is not an enemy, or the ally of an enemy, claiming any "interest, right, or title" in property seized by the Custodian to sue in equity to establish his "interest, right, or title" and to compel its return in the event of the Custodian's denial of a claim for the return thereof.

The attachment lien in this case is a security interest in the property in the Custodian's possession, and this security interest takes the claim of Orvis Brothers & Co. which it secures out of the category of an unsecured or simple debt claim. It is an "interest, right, or title" in the seized property within the meaning of Sec. 9(a), and may be recovered by suit under that section.

Furthermore, the Custodian will not deny that in administering seized alien property he has regarded and treated a claimant asserting a lien on frozen property subsequently *res* vested as presenting a claim of an "interest" in the property, and has deemed himself under a duty to return the "interest" claimed. Surely, his duty is no less when the return of the lienors' "interest" is sought by a Sec. 9(a) suit.

II

In practice, the Custodian has recognized and granted a priority to a New York attachment lien on blocked Japanese assets obtained without specific license therefor by payment of the judgment secured thereby, notwithstanding, that the assets of the Japanese debtor being administered by the Custodian are insufficient to pay the filed claims of all its American creditors.

In *Murray Oil Products Co., Inc.* v. *Mitsui & Co., Ltd.*, 55 F. Supp. 353 (S. D. N. Y.), aff'd 146 F. (2d) 381 (C. C. A. 2), a warrant of attachment was issued on December 22, 1941 by the Supreme Court, State of New York, County of New York. Without a specific Treasury license, the Sheriff levied thereunder on the bank balances of Mitsui & Co., Ltd., a Japanese national, with the National City Bank and Chase National Bank in New York City, which had been frozen on June 14, 1941 by Executive Order No. 8832 (6 F. R. 3715) under Executive Order No. 8389. Thereafter, in August 1942, the Custodian vested the attached bank accounts. After removal of the action to the Federal Southern District Court, the plaintiff recovered a judgment in May, 1944, which was affirmed by the Court of Appeals for the Second Circuit in December, 1944. After affirmance, the Custodian recognized the priority of the attachment lien and the validity of the judgment which it secured by paying the judgment creditor in full the amount of the judgment, together with the Sheriff's poundage fees (Appendix, *infra*, pp. 10-14).

But, the assets of Mitsui & Co., Ltd. taken over by the Custodian for administration under the Act are insufficient to pay the filed claims of all its American creditors, for the Custodian in the *Annual Report—Office of Alien Property, Department of Justice, for the Fiscal*

Year ended June 30, 1950, in reporting on the insolvent accounts being administered by him, states, at page 76 thereof, that:

> "During the past fiscal year initial processing was completed in respect of the * * * claims filed against the insolvent accounts of * * * Mitsui and Co., Ltd."

Although this Annual Report does not list the assets of and claims against Mitsui & Co., Ltd., the Custodian's office has informally advised the undersigned that Mitsui's assets in his hands amount to approximately $5,000,000, the filed claims total approximately $28,000,000, and that the claims of general creditors are not likely to be paid in full.

Since the attachment lien of Murray Oil Products Co., Ltd. was given recognition as a priority and its judgment paid in full, Orvis Brothers & Co. is entitled to receive the same treatment from the Custodian, even though the attachment lien was created after General Ruling No. 12 was issued, and by reason of the Custodian's refusal to satisfy its judgment in full, Orvis Brothers & Co. may recover under Sec. 9(a).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed and that of the District Court reinstated.

January 16, 1953.

HENRY I. FILLMAN,
Amicus Curiae.

Appendix

1. Order, stipulation and letter re *Murray Oil Products Co. Inc. v. Mitsui & Co. Ltd.*

At a Term of the United States District Court of the Southern District of New York, held in and for the said District, at the Federal Courthouse, Foley Square, in the Borough of Manhattan, City of New York, on the 21st day of February, 1945.

Present: HONORABLE SAMUEL MANDELBAUM, U. S. D. J.

C-18-459

MURRAY OIL PRODUCTS CO., INC.,

Plaintiff,

against

MITSUI & CO., LTD.,

Defendant.

Upon the annexed stipulation and the annexed consent, it is hereby

ORDERED that:

1. Upon the payment of the sum of $23,241.54 to the plaintiff and its attorney and the sum of $407.42 to the Sheriff of the City of New York as provided in the annexed stipulation, the warrant of attachment granted herein, on or about December 22, 1941, by the Supreme Court, New York County, wherein this action at that time was pending, be, and the same hereby is, satisfied, discharged and released.

2. The attachment and undertaking, given by the plaintiff, to wit, undertaking of the Fidelity & Deposit Company of Maryland, dated December 20, 1943, in the sum of $2,250 be, and the same hereby is, discharged.

SAMUEL MANDELBAUM (sgd.)
U. S. D. J.

.....

A True Copy

O.K. GEORGE J. H. FOLLMER (sgd.)
P.M. Clerk

(SEAL)

The foregoing is hereby consented to.

COPAL MINTZ (sgd.)
Attorney for Plaintiff.

JOHN F. X. McGOHEY (sgd.)
United States Attorney as attorney for Alien Property Custodian.

PUTNEY, TWOMBLY, HALL & SKIDMORE (sgd.)
Attorneys for Defendant.

Appendix

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MURRAY OIL PRODUCTS CO., INC.,

Plaintiff,

against

MITSUI & CO., LTD.,

Defendant.

Stipulation

IT IS HEREBY STIPULATED that:

1. There be paid, out of the attached funds on deposit with the National City Bank, in discharge and satisfaction of the attachment and the judgment herein: (1) to the plaintiff and Copal Mintz, its attorney, the sum of $23,241.54, made up as follows: $22,104.27, the amount of the judgment entered May 5, 1944, plus $1,062.82 interest thereon (calculated to February 23, 1945), plus $36.45 costs as taxed by the Clerk of the Circuit Court of Appeals; (2) to the Sheriff of the City of New York the sum of $407.42 in full for his fees and charges.

2. Upon delivery of the foregoing payments there shall be delivered to the defendant's attorneys and to the Alien Property Custodian at the latter's office at 120 Broadway, Borough of Manhattan, City of New York, satisfactions of the aforementioned judgments.

3. An order shall be entered herein satisfying, discharging and releasing the warrant of attachment herein

upon the making of the payments hereinabove provided and discharging the attachment bond which plaintiff filed at the time of the issuance of the warrant of attachment.

Dated: New York, February 20, 1945.

COPAL MINTZ (sgd.)
Attorney for Plaintiff.

JOHN F. X. MCGOHEY (sgd.)
United States Attorney as attorney for
Alien Property Custodian.

PUTNEY, TWOMBLY, HALL & SKIDMORE (sgd.)
Attorneys for Defendant.

(L E T T E R)

General Counsel

120 Broadway

In replying, please
refer to MSM:COL:amo

February 23, 1945

National City Bank of New York
55 Wall Street
New York, New York

Re: Murray Oil Products Company, Inc. v.
Mitsui & Company, Ltd.

Dear Sirs:

Reference is made to my letter to you, dated February 6, 1945, and your reply under date of February 14, 1945, in which you request specific instructions with respect to the payment of the judgment and sheriff's fees in the above entitled action.

By agreement with the attorney for the plaintiff in the said action and with the sheriff's office, two checks have been drawn on the account in your bank entitled, "Alien Property Custodian, case of Mitsui & Company, Ltd. impounded account", signed by Mr. Stanley B. Reid, and countersigned by Mr. L. M. Reed, the Custodian's duly authorized supervisor. One check is made payable to Murray Oil Products Company, Inc. and Copal Mintz, attorney, in the amount of $23,241.54, representing the principal amount of said judgment $22,142.27, and interest thereon at the rate of 6% from May 6, 1944 to February 3, 1945 in the amount of $1,092.34, and Circuit Court of Appeals taxed costs in the amount of $36.45. The second check is made payable to the Sheriff of the City of New York in the amount of $407.42, representing full payment of the sheriff's fees at the statutory rate in connection with the judgment.

The attachment heretofore issued against the account in your bank has been vacated by court order, and a certified copy of said order and satisfactions of the judgments herein has been delivered to this office.

Very truly yours,

JAMES E. MARKHAM,
Alien Property Custodian.